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In The
Supreme Court of the United States
October Term, 1984

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN; and EUGENE GLOVER, WILLIAM WINPISINGER and GEORGE POULIN as fiduciaries and trustees of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN,

Petitioners,

vs.

EDWARD SHAW, Individually and On Behalf of All Other Persons Similarly Situated,

Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondent, EDWARD SHAW, respectfully prays that this Court deny the petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 11, 1985.

Respondent adopts the statement in the petition with respect to the "Opinion Below" and "Jurisdiction."

STATUTORY PROVISIONS INVOLVED

To the statutory provisions set forth in the petition, respondent adds § 301 of the Retirement Equity Act of 1984, (Public Law 98-397), 29 U.S.C. 1054(g)(2), which substantially modified the statute at issue here:

> (2) For purposes of paragraph (1), a plan amendment which has the effect of—
>
> (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
>
> (B) eliminating an optional form of benefit,
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. . . .

———o———

STATEMENT OF THE CASE

For purposes of this opposition to the petition for certiorari, respondent adopts petitioners' Statement of the Case, reserving the right (should the writ of certiorari be granted) to set forth his independent Statement of the Case in his brief on the merits.

———o———

REASONS FOR DENYING THE WRIT

1. The Question Presented Does Not Meet The Guidelines Of Supreme Court Rule 17.

Supreme Court Rule 17 provides very limited standards with respect to review on writ of certiorari. While

these standards are not "controlling," it remains that Petitioners do not meet any of them.

Petitioners do not contend that there exists any conflict between the decision of the Ninth Circuit and other federal courts of appeals (or this Court) on the issue presented. Petitioners do not contend that there has been a departure "from the accepted and usual course of judicial proceedings, [so] as to call for an exercise of this Court's power of supervision." The only ground on which petitioners seek review by certiorari is that the Ninth Circuit has "decided an important question of federal law which has not been, but should be, settled by this Court."

A. Section 301 Of The Retirement Equity Act Of 1984 (29 U.S.C. § 1054(g) (2)) Has Modified And Clarified The Statute And Removed Any Public Importance Of The Question Here Presented.

The Retirement Equity Act of 1984 (hereinafter REA), *inter alia,* amended § 204(g) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1054(g), by adding subparagraph (2). Thus, future court decisions interpreting 204(g) will not be interpreting the same statute at issue here. Were this Court to grant the Petition and render its interpretation of this section as it existed before the amendment, the decision may be helpful but not necessarily controlling.

In light of the enactment of REA, and the standards governing the exercise of the Court's discretionary power of review upon writ of certiorari, and with due regard to the proper functioning of the limited reviewing power

to which this Court is confined, this case cannot be deemed to be one in which "there are special and important reasons" for granting the writ. *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 99 L.ed. 897, 901, 75 S.Ct. 614 (1955). See also *District of Columbia v. Sweeney,* 310 U.S. 631, 84 L.ed. 1402 (where a tax is laid under a statute which has been repealed, the question is not of public importance, and certiorari will be denied).

B. The Question Here Presented Is Of Isolated Significance; It Has No National Importance.

Petitioners contend that "the Ninth Circuit's decision will adversely affect a matter of significant public importance—the continued availability of ancillary benefits to millions of private pension plan participants." (Petition, p. 7.) Petitioners' brush is broad but not convincing. As petitioners themselves pointed out in their Opening Brief submitted to the Court of Appeals (page 13, footnote 6):

> Mr. Shepard A. Sheinkman, the Martin E. Segal Company executive assigned to the IAM Pension Plan account, indicated that the living pension feature was *unusual* in that most other pension plans pay fixed retirement benefits at the time of retirement and do not provide for post-retirement adjustments. (R.E. 18, p. 6) (Emphasis added)

In the entire history of this litigation, neither the parties nor the courts which have rendered opinions have been able to find a decision, published or not, dealing with anything similar to a "living pension." There is no "density of litigation" dependent upon a Supreme Court

decision in this matter, a factor cited by Justice Frankfurter as one of the chief determinants of whether the "intrinsic importance" of an issue is sufficient to warrant certiorari. Frankfurter & Fisher, 51 Harv.L.Rev. 577, 598 (1938).

Post retirement increases were more common in the public pension arena, where it has been consistently held that amendments such as the one here would *not* be allowed. *Betts v. Board of Administration,* 21 C.3d 859, 148 Cal.Rptr. 158, 582 P.2d 614 (1978).

The Ninth Circuit decision in this case did not purport to deal with the larger question of the precise definition of "ancillary" benefits. Rather, the decision was specific and confined to the holding that this unusual "living pension" was more like a retirement benefit than an ancillary benefit. The Ninth Circuit clearly distinguished between ancillary benefits such as medical or life insurance which lack the "primary function . . . [of] provid[ing] retirement income" which are in no way affected by the decision, and a benefit such as the one at issue here which is clearly retirement income. (Decision, pp. 11a and 12a) As was the case in *Rice, supra,* the question presented is of "isolated significance," not warranting the grant of certiorari.

C. The Burden Upon Petitioners Resulting From The Decision Does Not Warrant The Granting Of Certiorari.

There is no doubt that the Ninth Circuit's decision will be a burden to Petitioners. However, the situation in which the Plan finds itself is largely of its own making. At the time the amendment was under consideration, the

Pension Plan had the right to seek the approval of the "Secretary" for such a reduction on the grounds of the very hardship they now assert. While Congress wanted the "Secretary" to make an objective determination of business hardship, petitioners contend that they alone are entitled to make that determination. Neither was there legal compulsion requiring the substantial wage increases petitioners gave to their active employees, which trigger the "living pension" provisions of the Plan.

Since the Plan trustees adopted an amendment eliminating this accrued benefit without first seeking approval of the "Secretary" by proving business hardship "they cannot now complain of their financial straits." *Hoover v. Cumberland, Md. Area Teamsters Pension Fund,* 756 F.2d 977 (3rd Cir 1985) (slip op. p. 16).

In any event, this Court does not sit for the benefit of the particular litigators. *Rice, supra,* 99 L.ed. at 901. Certiorari cannot serve as relief from an erroneous result or even from individual hardship. 43 Harv.L.Rev. 33, 52 (1929). Importance of the outcome merely to the parties is not enough; "This is not the supreme court of review for every case decided 'unfairly' by every court in the country." *Rogers v. Missouri P.R. Co.,* 352 U.S. 493, 500, 524, 1 L.ed.2d 493, 77 S. Ct. 443 (1957), Frankfurter, J., Dissent, 1 L.ed.2d at 530.

2. The District Court And The Court Of Appeals Were Correct In Holding That The Living Pension Feature Is An Accrued Benefit.

Before the passage of ERISA, it was clear that a retiree's benefit as described in the plan at the time of retirement could not be changed without the consent of

the retiree. *Allied Chemical & Alkali Workers v. P.P.G. Co.*, 404 U.S. 157, 161, n. 20; 30 L.ed. 2d 341; 92 S.Ct. 383 (1971); *U.M.W. v. Robinson*, 455 U.S. 562, n. 14; 71 L.ed.2d 419; 102 S.Ct. 1226 (1982).

ERISA was designed to even further protect the interests of participants and beneficiaries.

> It is hereby further declared to be the policy of this Act to protect . . . the interests of participants in private pension plans and their beneficiaries by *improving the equitable character* and the soundness of such plans . . . (ERISA §2(c), 29 U.S.C. 1001(c)) (emphasis added).

However, ERISA also gave petitioners something they did not have before—a method of reducing accrued benefits by showing "business hardship." They chose not to exercise that right and instead argue that this is merely an ancillary benefit, not a retirement benefit.

The legislative history of ERISA makes clear that Congress intended that the term "accrued benefit" refer to normal retirement age benefits. While a plan may also provide additional retirement-like benefits that begin before normal retirement age, these additional benefits were not (before REA) generally considered as "accrued benefits."

These "ancillary benefits"—such as payment of medical expenses, disability benefits, life insurance premiums and early retirement supplements—may also be provided by a subsequent employer. However, the key factor in distinguishing between the two is whether the primary function of the benefit in question is to provide retirement income at or after *normal* retirement age—a time

when presumably the participant will not have a subsequent employer.

Indeed, as Petitioner points out, Congress characterized a social security supplement as an ancillary benefit, but as noted in the legislative history cited in Petitioner's Appendix (page 18a), these are benefits payable *before* normal retirement age.

> Also, the accrued benefit to which the vesting rules apply is not to include . . . so-called social security supplements which are commonly paid in the case of *early* retirement *but then cease* when the retiree attains the age at which he becomes entitled to receive current social security benefits. . . . (emphasis added)

With the passage of REA, even this social security supplement to which Petitioners seek to analogize is now also considered an accrued benefit.

All of the cases cited by petitioners can be distinguished on the basis that they involved either (or both) benefits payable *before* normal retirement age or the amendment applied only to *future* retirees who had not yet reached normal retirement age.

The accrued benefit to which Shaw is entitled is expressed in terms of a "formula," which is perfectly proper (Opinion of the district court, petitioner's supplemental appendix, page SA-4). So it was in I.R.S. Letter Ruling 80224147 (March, 1980), C.C.H. Pension Plan Guide, ¶17,-371X, pages 20,885-87 (reprinted in the Appendix).[1] There the plan had a provision for payment of benefits in a lump sum at retirement and, as here, a post retirement

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[1] This letter ruling is not cited as "precedent", 26 U.S.C. 6110(j) (3), but only as an indication of the position of the IRS.

cost of living feature. In order to qualify as a "lump sum distribution" the entire balance of the account (accrued benefit) must be paid in one tax year. The letter ruling held:

> Accordingly, the balance to the employee's credit *must include the cost-of-living adjustment* if the distribution is to be eligible for lump sum tax treatment under section 402(e) of the Code. (C.C.H. Guide at Appendix page 5) (emphasis added)

Although the I.R.S. approved Petitioners' plan as tax exempt, there is absolutely no evidence that the I.R.S. was specifically advised of this change nor that it was considered by them. The fact that they issue such approval to tens of thousands of plans each year inveighs against the argument that the I.R.S. was even aware of what had occurred. Nonetheless, it is solely within the jurisdiction of the "Secretary," not the I.R.S., to approve reductions in accrued benefits.

Petitioners' essential argument is that they are entitled to break a promise made to Shaw during his working years, a promise that presumably was at least a partial inducement for his continued employment. Now that he is unable to "quit" his job and work for another employer, they seek to unilaterally renegotiate the promise. As stated in *Hoover, supra,* at slip opinion page 19:

> A plan amendment that retroactively reduces benefits promised to plaintiffs for almost seven years is precisely the sort of inequity Congress designed ERISA to prevent.

The unfairness to Shaw is apparent. At the time he retired, the living pension feature could not be taken from him. *Allied Chemical, supra.* Thereafter, ERISA, a law

designed to further protect his rights, became applicable to this Plan. The Plan is now asserting its alleged right to take away from Shaw that which he spent his productive years earning. They want to take it away so they can provide even larger wage increases to the currently active employees. Surely ERISA did not contemplate such a result.

———o———

CONCLUSION

For all the reasons stated above, this Court, in the exercise of its discretion pursuant to Rule 17, should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

Letter Ruling 8024147, March, 1980.

Taxability of Beneficiary

This is in response to a letter dated January 23, 1980, in which your authorized representative requested a ruling on your behalf concerning certain federal income tax consequences to Plan X participants as a result of proposed amendments to the plan.

M Corporation maintains Plan X, a defined benefit pension plan, which was determined by the appropriate District Director to be qualified under section 401(a) and tax-exempt under section 501(a) of the Internal Revenue Code.

Under Plan X, absent a timely election of another option, the retirement benefit of an unmarried employee is paid in the form of straight life annunity and the retirement benefit of a married employee is paid in the form of a joint and 50% survivor annunity with the employee's spouse as beneficiary. Optional payout methods are available if a timely election is filed. These options include (1) a joint and survivor annunity in any form which satisfies the incidental death benefits requirement, (2) a life annunity with payment of 12 months certain, and (3) in the case of employees eligible for each or normal retirement benefits who retire from active employment after age 60, a lump sum equal to the actuarial equivalent of the employee's straight life annunity.

It is proposed that the amount payable under the lump sum option would be calculated in accordance with a table to be published in the Plan X document and that the tables

will be produced utilizing unisex rates based upon the 1971 Group Annunity Mortality Table at a two-to-one male/female ratio (current ratio of active plan participants and a discount rate that will fluctuate according to the Moody's Average of Yield on Aaa Corporate Bonds (Moody Aaa rate). The following is an abbreviated example of the factors that would be produced using such a table:

TABLE 1

Lump Sum Value of $1/Year Life Annunity
With No Adjustment for Post-Retirement Increases

Age at Retirement	Interest Rate 6	7	8½	10	12
60	11.05	10.23	9.15	8.28	7.33
62	10.55	9.78	8.81	8.00	7.12
65	9.75	9.09	8.25	7.54	6.76
70	8.35	7.86	7.23	6.68	6.07

M Corporation also has under consideration a proposal whereby Plan X would be amended to include a provision for a post-retirement cost-of-living adjustment for all participants and beneficiaries which would commence at age 66 for participants retiring at age 65 or earlier, or after the first year of retirement for participants retiring after age 65. Under the proposed cost-of-living adjustment, periodic benefits payable under Plan X after retirement age would be automatically increased or decreased each year by 50% of the increase or decrease in the Consumer Price Index for All Urban Consumers (CPI-U, U. S. City Average, all items, 1967, equalling one hundred (100), from the U. S. Department of Labor Bureau of Labor Statistics, Washington, D. C.) (hereinafter "CPI") with a maximum

limit of 4% per year increase in benefits (which would occur with an increase of 8% or more in the CPI). There would, however, be no adjustment in benefits if the CPI increased less than 2% in any year. In no event would a retired participant's benefit be adjusted to an amount less than he was receiving at retirement.

Under the proposal, participants who elect a lump sum payout of their benefit under Plan X may be paid any cost-of-living adjustment over time as a life annunity, as annual single sum increments, or as part of the lump sum distribution made at the time of retirement, depending on the discretion of the Plan X administrator.

If the cost-of-living adjustment is paid in one lump sum, the amount of the lump sum including such adjustment will be calculated in accordance with Table 2 that uses the same unisex rates and fluctuating discount rates as in Table 1, after reducing the applicable Moody Aaa rate by an assumed rate of real return, thus recognizing only the inflation factor in determining the lump sum adjustment.

TABLE 2

Lump Sum Value of $1/Year Life Annunity
Adjusted for Assumed Post-Retirement Increases

Age at Retirement	Interest Rate 6	7	8½	10	12
60	12.00	11.27	10.30	9.46	8.28
62	11.64	11.02	10.20	9.47	8.33
65	11.10	10.68	10.10	9.58	8.54
70	9.32	9.02	8.59	8.23	7.43

These long term Bonds rates which are financial indicators for the next twenty years reflect two components;

an expected rate of real return on investments and an expected rate of inflation. For purposes of these calculations, the component for the expected real rate of return is assumed to be two and one-half percent (2½%). The 2½% rate of real return was developed by M Corporation's economists based upon their analyses of bond rates and rates of inflation of the U. S. economy over the last twelve decades. Examples of how Table 2 would be prepared with expected rates of inflation and cost-of-living adjustments tied to various Moody Aaa rates appear below:

Moody Aaa Rate	Assumed Inflation Rate as Expressed by the Percentage Change in the CPI	Cost-of-Living Adjustment
6.0%	3.5%	1.75%
7.0%	4.5%	2.25%
8.0%	5.5%	2.75%
8.5%	6.0%	3.0%
9.0%	6.5%	3.25%
10.0%	7.5%	3.75%
11.0%	8.5%	4.0%
12.0%	9.5%	4.0%
13.3%	11.0%	4.0%

Based on the foregoing, your authorized representative requested a ruling on your behalf that an employee who elects to receive his retirement benefit under Plan X in a lump sum at the time of retirement computed in accordance with the proposed Plan X adjustments and whose lump sum at such time includes the cost-of-living adjustment based on the Tables under Plan X will be in receipt of his entire nonforfeitable accrued benefit under Plan X in compliance with section 411 of the Code and will be

entitled to treat the entire distribution as a lump sum distribution under section 402(e) (4) (A) of the Code.

Section 402(e) (4) (A) of the Code defines a lump sum distribution as the distribution or payment from a qualified employees' trust within one taxable year of the recipient of the balance to the credit of an employee which becomes payable to the recipient, for example, on account of the employee's separation from the service. Section 1.402(e)-2(d) (1) (ii) of the Proposed Income Tax Regulations provides that a distribution or payment is not a lump sum distribution unless it constitutes the balance to the credit of the employee at the time the distribution or payment commences, i.e., the date on which the employee separated from service.

Under the proposed amendment to Plan X, upon his separation from service, a participant has a calculable interest in the prospective cost-of-living increase in his retirement benefits which, therefore, constitutes part of the balance to the employee's credit. Accordingly, the balance to the employee's credit must include the cost-of-living adjustment if the distribution is to be eligible for lump sum tax treatment under section 402(e) of the Code.

Accordingly, we conclude that an employee who elects to receive his retirement benefit under Plan X in a lump sum at the time of retirement computed in accordance with the proposed Plan X adjustments and whose lump sum at such time includes the cost-of-living adjustment based on the Tables under Plan X will be in receipt of his entire nonforfeitable accrued benefit under Plan X in compliance with section 411 and will be entitled to treat

the entire distribution as a lump sum distribution under section 402(e) (4) (A).

This ruling is based on the following assumptions:

(a) that the requirements of Code sections 402(e) (4) (B), (C), and (H), to the extent applicable, are satisfied;

(b) that the benefit with respect to a Plan X participant will not exceed the limitations provided under section 415(b) of the Code;

(c) that Plan X will remain qualified and tax-exempt under sections 401(a) and 501(a) of the Code.